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## Transparency in Administrative Courts: From the Outside Looking In

Elizabeth Figueroa

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# Transparency in Administrative Courts: From the Outside Looking In\*

By Elizabeth Figueroa\*\*

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*The very word “secrecy” is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it.*<sup>1</sup>

John F. Kennedy

## I. INTRODUCTION

This article is not intended to address the accountability of the administrative law judiciary.<sup>2</sup> Nor is it about the accountability of management to employees within administrative courts. Rather, it is about the transparency of the administrative court as a government entity as viewed by the public. Administrative courts’ public role functions and their transparency in the public eye clearly overlap with accountability measures of the administrative law judiciary and court management’s accountability to court employees. For this reason, they are addressed, inevitably, in this article, but only as they relate to court transparency in the public eye.

The catalyst for this article was the number of transparency issues

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\* I presented a preliminary preview of this article at the National Association of Administrative Law Judiciary (NAALJ) Fortieth Annual Conference in Memphis, Tennessee, on September 26, 2014.

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<sup>1</sup> President John F. Kennedy, Waldorf-Astoria Hotel, New York City, Address Before the American Newspaper Publishers Association (Apr. 27, 1961), *available at* [http://www.jfklibrary.org/Research/Research-Aids/JFK-Speeches/American-Newspaper-Publishers-Association\\_19610427.aspx](http://www.jfklibrary.org/Research/Research-Aids/JFK-Speeches/American-Newspaper-Publishers-Association_19610427.aspx).

<sup>2</sup> See Hon. Edwin L. Felter, Jr., *Accountability in the Admin. Law Judiciary: The Right and the Wrong Kind*, 86 DENV. U.L. REV. 157 (2008) for a discussion on judgmental and developmental accountability in the administrative law judiciary.



cropping up in government and other sectors within the United States and throughout the rest of the world. During the past decade, many articles focused on transparency in international law and corrupt government indexes were published.<sup>3</sup> Studies on the need for transparency in Latin American and other courts were funded and published.<sup>4</sup> Rule of law initiatives that promote government transparency, such as the American Bar Association's Rule of Law Initiative (ABA ROLI), gained momentum.<sup>5</sup> United States federal courts implemented electronic filing systems, thereby becoming the world's most transparent court system.<sup>6</sup> Academia published studies advocating even greater transparency of federal courts' data.<sup>7</sup> Corporate governance reforms that require transparency, such as the Sarbanes-Oxley Act (SOX), were implemented.<sup>8</sup> Freedom of

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<sup>3</sup> Transparency International, an organization founded in Germany in 1993 with a mission to stop corruption and promote transparency, accountability, and integrity, has published a corruption index each year since 1995, scoring how international business people and financial journalists perceive corruption in countries and territories around the world. *See* TRANSPARENCY INTERNATIONAL, <http://www.transparency.org> (last visited Mar. 11, 2015).

<sup>4</sup> *See, e.g.,* Álvaro Herrero & Gaspar Lopez, *Access to Information and Transparency in the Judiciary: A Guide to Good Practices from Latin America*, ASOCIACIÓN POR LOS DERECHOS CIVILES & WORLD BANK INST. (2010), [http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Transparency\\_Judiciary.pdf](http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Transparency_Judiciary.pdf).

<sup>5</sup> The ABA ROLI, established in 2007, is "an international development program that promotes the rule of law . . . [and] implements legal reform programs in roughly 60 countries," many of which programs focus on the development of transparent, effective judicial systems. *See Our Origins & Principles*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/advocacy/rule\\_of\\_law/about/origin\\_principles.html](http://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html) (last visited Mar. 11, 2015).

<sup>6</sup> Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 484 (Feb. 2009).

<sup>7</sup> *Id.* at 494–514.

<sup>8</sup> *See* 15 U.S.C. §§ 7201–7266 (2012). SOX, also referred to as the Public Company Accounting Reform and Corporate Responsibility Act, was enacted to establish standards, oversight and disclosure controls for public companies following highly publicized public governance failures at companies such as Enron. Ethan G. Zellzer, *The Sarbanes-Oxley Act: Accounting for Corporate Corruption?*, 15 LOY. CONSUMER L. REV. 27 (2002); Benjamin E. Hermalin & Michael S. Weisbach, *Transparency and Corporate Governance*, [http://www.law.yale.edu/documents/pdf/cbl/HW\\_mkts\\_v5.pdf](http://www.law.yale.edu/documents/pdf/cbl/HW_mkts_v5.pdf) (2007).

Information Act (FOIA) requests proliferated throughout federal government agencies.<sup>9</sup> On his first full day in office, President Barack Obama signed the Memorandum on Transparency and Open Government as his first executive action, purportedly ushering in a new era of open and accountable government meant to bridge the gap between the American people and their government, which was followed by a flurry of transparency initiatives.<sup>10</sup> Also in 2009, the United States Attorney General issued FOIA Guidelines, requiring broader government disclosure without the need for a request.<sup>11</sup> At the state level, open government laws that require greater government openness, on a continuous basis, without demand, were passed in some forty states.<sup>12</sup> A more obscure form of transparency presented itself in WikiLeaks' publications of documents, including National Security Agency (NSA) records submitted by self-professed whistleblower Edward Snowden, as well as other whistleblowers, both anonymous and identified.

The push toward open government from these widely divergent sectors, together with open government's relationship to access to justice and the judiciary, piqued my interest. I set out to examine the evolution of transparency, its pros and cons, how transparency of government bodies is defined and measured, and finally, to suggest how transparency might be defined and measured in the administrative law court system. Borrowing from government and non-government organizations that have developed transparency checklists, I conclude with a proposed checklist for administrative

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<sup>9</sup> See *Data*, FOIA.GOV, <http://www.foia.gov/data.html> (last visited Mar. 11, 2015).

<sup>10</sup> See Transparency and Open Government, Memorandum for the Heads of Executive Departments, 74 Fed. Reg. 4685, U.S. GOVERNMENT PRINTING OFFICE, (Jan. 21, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>.

<sup>11</sup> See Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009). The Department of Justice has since attempted to solve problems with FOIA implementation through an online tool, FOIA.gov, which displays statistics on agency performance under FOIA. See *Data*, *supra* note 9.

<sup>12</sup> See generally *Open Government Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/open-government-guide> (last visited Dec. 16, 2014) (providing guides to every state's open records and open meetings laws).

courts' use as a tool in considering, developing, and measuring their own transparency.

## II. WHAT IS TRANSPARENCY?

The word “transparency” is derived from Medieval Latin.<sup>13</sup> “Trans” means “through.”<sup>14</sup> “Parere” means “come in sight, appear.”<sup>15</sup> The word’s figurative sense of “easily seen through” was first used in the 1590s.<sup>16</sup> In contemporary lay language, transparency is the “quality or state of being transparent.”<sup>17</sup> Something that is transparent is “capable of transmitting light so that objects or images can be clearly perceived; readily understood or clear.”<sup>18</sup>

In legal terminology, transparency takes on a logical, but more nuanced, definition. It is defined as “[o]penness; clarity; . . . lack of guile and attempts to hide damaging information . . . . [Transparency] is used of financial disclosures, organizational policies and practices, lawmaking, and other activities where organizations [interact] with the public.”<sup>19</sup> Transparency is the opposite of secrecy.<sup>20</sup>

As it relates to government, transparency means that decisions are made and enforced in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided in

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<sup>13</sup> Transparency, ONLINE ETYMOLOGY DICTIONARY, [http://www.etymonline.com/index.php?term=transparency&allowed\\_in\\_frame=0](http://www.etymonline.com/index.php?term=transparency&allowed_in_frame=0) (last visited Mar. 6, 2015).

<sup>14</sup> Transparent, ONLINE ETYMOLOGY DICTIONARY, [http://www.etymonline.com/index.php?term=transparent&allowed\\_in\\_frame=0](http://www.etymonline.com/index.php?term=transparent&allowed_in_frame=0) (last visited Mar. 6, 2015).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Transparency*, WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1228 (1988).

<sup>18</sup> *Id.*

<sup>19</sup> *Transparency*, BLACK’S LAW DICTIONARY 1537 (8<sup>th</sup> ed. 1990).

<sup>20</sup> Gary D. Bass, Danielle Brian & Norman Eisen, *Why Critics of Transparency Are Wrong*, CENTER FOR EFFECTIVE PUBLIC MANAGEMENT AT BROOKINGS 12 (2014), *available at* <http://www.brookings.edu/~media/research/files/papers/2014/11/24%20why%20critics%20transparency%20wrong%20bass%20brian%20eisen/critics.pdf>.

easily understandable forms and media. But simply making information available is not sufficient transparency. To the contrary, some argue that large amounts of raw information in the public domain may breed opacity rather than transparency.<sup>21</sup> Indeed, advocates of open government acknowledge that intermediaries from the private sector, academia, or nonprofits are needed to analyze and distill much of the information and data that is made available in order for it to be understood and used by the public.<sup>22</sup>

From the stakeholders' perspective, transparency provides them with knowledge about the processes, structure and products of government.<sup>23</sup> Greater transparency and participation in government are often considered to operate side by side.<sup>24</sup> Yet studies show that while participation is positively associated with transparency, transparency in and of itself does not lead to participation.<sup>25</sup>

From the government's perspective, transparency is consistent with the general principle that public officials and civil servants have a duty to act visibly, predictably and understandably to promote participation and accountability.<sup>26</sup> At its core, the purpose of transparency initiatives is "to strengthen the accountability of governmental agencies and to ensure 'that persons with public responsibilities [are] answerable to 'the people' for the performance of their duties.'"<sup>27</sup>

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<sup>21</sup> TRANSPARENCY & ACCOUNTABILITY INITIATIVE, <http://www.transparency-initiative.org/about/definitions> (last visited June 17, 2015).

<sup>22</sup> Bass, Brian & Eisen, *supra* note 20, at 13–14; LoPucki, *supra* note 6, at 486, 537.

<sup>23</sup> Eric W. Welch, *The Relationship Between Transparent and Participative Government: A Study of Local Governments in the United States*, 78 INT'L REV. OF ADMIN. SCIS. 93, 94, 98, 108 (2012).

<sup>24</sup> *Id.* at 93.

<sup>25</sup> *Id.*

<sup>26</sup> Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 82 (2012).

<sup>27</sup> *Id.* at 80 (quoting MICHAEL W. DOWDLE, PUBLIC ACCOUNTABILITY: CONCEPTUAL, HISTORICAL, AND EPISTEMIC MAPPINGS, IN PUBLIC ACCOUNTABILITY: DESIGN, DILEMMAS AND EXPERIENCES 1, 3 (Michael W. Dowdle ed., 2006)).

### III. REASONS FOR TRANSPARENCY IN GOVERNMENT

Transparency is a fundamental value of democracies and is viewed as an important characteristic of good governance. It provides stakeholders with knowledge about processes, structures and products of government. Transparency results from a way of governing—of administering and managing by the government such that control and participation by citizens in public affairs matters is fostered. Participation refers to the quality, quantity and diversity of input of stakeholders in government. Greater transparency and participation are considered to operate side-by-side. Participation results both in and from access to public information.

Among the notions behind the view that transparency is an important characteristic of good governance are the following: First, transparency promotes governmental accountability, and without it accountability is not possible.<sup>28</sup> It also provides the public with a better understanding of whom to blame when problems arise and government fails.<sup>29</sup> Second, transparency promotes democracy.<sup>30</sup> It helps develop democratic societies by allowing citizens to control their government.<sup>31</sup> Greater transparency fosters citizen participation in government by allowing citizens to “see through” its workings and investigate whether or not their leaders and organizations have met their expectations; the government brings the public into its inner circles and empowers citizens to contribute to decision making.<sup>32</sup> As citizens gain knowledge and understanding, their trust in government begins to grow.<sup>33</sup> Third, transparency reduces government corruption.<sup>34</sup> It allows the public to see if government regulators are

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<sup>28</sup> *Id.* at 83; Bass, Brian & Eisen, *supra* note 20, at 2, 6, 8; TRANSPARENCY AND ACCOUNTING INITIATIVE, *supra* note 21.

<sup>29</sup> Bass, Brian & Eisen, *supra* note 20, at 15.

<sup>30</sup> *Id.* at 2, 6; Shkabatur, *supra* note 26, at 83.

<sup>31</sup> Bass, Brian & Eisen, *supra* note 20, at 2; Archon Fung, *Infotopia: Unleashing the Democratic Power of Transparency*, 41 POL. & SOC’Y 183, 184–185, 190 (2013).

<sup>32</sup> Bass, Brian & Eisen, *supra* note 20, at 15; TRANSPARENCY & ACCOUNTABILITY INITIATIVE, *supra* note 21.

<sup>33</sup> Bass, Brian & Eisen, *supra* note 20, at 16.

<sup>34</sup> *Id.* at 2, 12, 13.

getting too cozy with regulated interests.<sup>35</sup> Fourth, transparency promotes societal progress.<sup>36</sup> It allows for dissemination of information, which, in turn, helps produce greater knowledge and societal progress.<sup>37</sup>

Critics advance as many arguments that transparency does not promote public accountability. First, transparency does not promote or equate to good government; nor does it lead to effective competent government.<sup>38</sup> The “nuts and bolts of how government actually works on a day-to-day basis” are overlooked in blanket, global pronouncements on government transparency.<sup>39</sup> “[F]ierce compromises and hard bargaining [are needed and] are easier to accomplish when the cameras are not rolling.”<sup>40</sup> “Transparency results in government indecision, poor performance, and stalemate.”<sup>41</sup> The focus should be on administrative competency and accountability. Second, transparency checklists are superficial measures of government—they measure only how good a website is, but not actual performance.<sup>42</sup> Third, transparency promotes process over substance, or it at least prioritizes process over substance.<sup>43</sup> The “process value might well impede . . . attainment of specific substantive policy objectives.”<sup>44</sup> Further, there are mechanisms already in place for disclosure and accountability—such as notice and comment in rule-making, and formal adjudication—which ensure transparency.<sup>45</sup> Pre-enactment transparency is not necessary. Pre-enactment transparency “inject[s] the body politic into administrative decision-making” procedures that already exist.<sup>46</sup> Fourth,

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<sup>35</sup> *Id.* at 15.

<sup>36</sup> *Id.* at 17.

<sup>37</sup> See generally Bass, Brian & Eisen, *supra* note 20; Shkabatur, *supra* note 26.

<sup>38</sup> Ronald J. Krotoszynski, Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google, Government, and the Difficulties of Securing Effective Governance*, 65 U. MIAMI L. REV. 449, 452 (2011).

<sup>39</sup> *Id.* at 459.

<sup>40</sup> *Id.* at 476.

<sup>41</sup> Bass, Brian & Eisen, *supra* note 20, at 1.

<sup>42</sup> Shkabatur, *supra* note 26, at 98–119.

<sup>43</sup> Krotoszynski, *supra* note 38, at 459–77.

<sup>44</sup> *Id.* at 459.

<sup>45</sup> *Id.* at 479.

<sup>46</sup> *Id.*

transparency does not promote democracy.<sup>47</sup> Administrative agencies “probably lack the capability to consider . . . hundreds, or even thousands, of citizen comments . . . .”<sup>48</sup> Consequently, agencies may ignore or patronize the public with generic form responses, thus reducing citizens’ confidence in government.<sup>49</sup> Fifth, information and data released in the name of transparency do not yield transparency.<sup>50</sup> Agencies retain control over regulatory data and thus withhold information that is essential for public accountability purposes.<sup>51</sup> Quantity over quality of data is prioritized; more data does not yield more transparency.<sup>52</sup> Data quality is poor and reported inaccurately.<sup>53</sup> Average citizens cannot decipher data.<sup>54</sup> Intermediaries from academia and other sectors are needed to cull and interpret data to make it understandable to the public.<sup>55</sup> Sixth, proponents of transparency are motivated by political agendas.<sup>56</sup> Finally, transparency measures lack enforcement.<sup>57</sup> Enforcement measures for those who offend transparency requirements are missing.<sup>58</sup>

When synthesized, the arguments for and against transparency suggest an overriding shortcoming in online transparency policy and the information frequently provided in the name of open government.<sup>59</sup> In urging a paradigm shift away from release of quantitative raw data to release of agency decision-making processes and performance, advocates point to the following online transparency shortcomings: Significant amounts of information are

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<sup>47</sup> *Id.* at 475–76.

<sup>48</sup> *Id.* at 476.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 476–77.

<sup>51</sup> Shkabatur, *supra* note 26, at 117.

<sup>52</sup> Krotoszynski, *supra* note 38, at 465.

<sup>53</sup> Shkabatur, *supra* note 26, at 108–109.

<sup>54</sup> *Id.* at 118–19.

<sup>55</sup> *Id.*

<sup>56</sup> Bass, Brian & Eisen, *supra* note 20, at 12–15.

<sup>57</sup> Shkabatur, *supra* note 26, at 118.

<sup>58</sup> See Krotoszynski, *supra* note 38, at 480; see also Shkabatur, *supra* note 26, at 81, 106, 111. See generally Bass, Brian & Eisen, *supra* note 20.

<sup>59</sup> Shkabatur, *supra* note 26, at 140.

provided as raw data, without context or other explanation.<sup>60</sup> Information is released, or not released, at the agency's discretion, and not necessarily to meet public demand.<sup>61</sup> The information appears random because, as released, it is not linked to other information or to agency decision-making processes or activities. Release of raw data in this manner, however, is in keeping with open-source models premised on the belief that professional intermediaries will collaboratively develop socially useful applications to the data.<sup>62</sup> But much of the raw data released goes undeveloped by intermediaries and, therefore, cannot be deciphered by the public.<sup>63</sup> Some suggest that if administrative agencies provided targeted information giving context and answering questions related to decision-making processes and performance, information disclosed in the name of transparency could become more meaningful and a viable accountability tool for the public, even in the absence of intermediaries.<sup>64</sup>

#### IV. THE EVOLUTION OF TRANSPARENCY IN GOVERNMENT

In Western history, the concept that government should be open to public scrutiny dates back to at least the time of the Enlightenment.<sup>65</sup> Some of the many hallmarks in open government are highlighted on the following timeline:

-Circa 1685–1815: The Enlightenment (aka the Age of Reason)  
Philosophers attacked the absolutist doctrine of state secrecy<sup>66</sup>

-1766: Freedom of the Press Act passed in Sweden<sup>67</sup>

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<sup>60</sup> *Id.* at 111–12.

<sup>61</sup> *Id.* at 117–18.

<sup>62</sup> *Id.* at 112.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 127–28.

<sup>65</sup> KEVIN ROEBUCK, E-SERVICES: HIGH-IMPACT STRATEGIES—WHAT YOU NEED TO KNOW: DEFINITIONS, ADOPTIONS, IMPACT, BENEFITS, MATURITY, VENDORS 102 (2012).

<sup>66</sup> *Id.*; *Enlightenment*, HISTORY, <http://www.history.com/topics/enlightenment> (last visited April 13, 2015).

<sup>67</sup> ROEBUCK, *supra* note 65, at 102.



- 1789: Bill of Rights passed in the United States, guaranteeing freedom of the press,<sup>68</sup> requirements for public budgetary accounting established through constitutional articles in the United States<sup>69</sup>
- 1789: Declaration of the Rights of Man and of the Citizen passed in France, proclaiming the freedom of the press<sup>70</sup>
- 1935: The Administrative Procedure Act of 1946 passed in the United States<sup>71</sup>
- 1951: Act on Publicity of Official Documents passed in Finland<sup>72</sup>
- 1966: Freedom of Information Act passed in the United States<sup>73</sup>
- 1970s: Access to Information Acts passed in Denmark, Norway, France, and The Netherlands<sup>74</sup>
- 1976: Government in the Sunshine Act passed in the United States<sup>75</sup>
- 1979: Cameras installed in the United States House of Representatives<sup>76</sup>

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<sup>68</sup> *Bill of Rights Passes Congress*, HISTORY, <http://www.history.com/this-day-in-history/bill-of-rights-passes-congress> (last visited April 13, 2015).

<sup>69</sup> ROEBUCK, *supra* note 65, at 102.

<sup>70</sup> *The Freedom of the Press: Fundamental Legal Cornerstones*, FRANCE.FR, <http://www.france.fr/en/institutions-and-values/freedom-press-fundamental-legal-cornerstones.html> (last visited April 13, 2015).

<sup>71</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>72</sup> ROEBUCK, *supra* note 65, at 102.

<sup>73</sup> *Id.*; Freedom of Information Act, 5 U.S.C. § 552 (2012).

<sup>74</sup> Freedom of Information Act § 552.

<sup>75</sup> Government in the Sunshine Act, 5 U.S.C. § 552(b) (2012).

<sup>76</sup> *Speaker Martin's Television Debut: The House and Television*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES,

- 1986: Cameras installed in the United States Senate<sup>77</sup>
- 1990s: Access to Information Acts passed in Hungary, Ireland, Thailand, and South Korea<sup>78</sup>
- 1996: Electronic Freedom of Information Act (E-FOIA) Amendments of 1996 passed in the United States<sup>79</sup>
- 2002: E-Government Act of 2002 passed in the United States<sup>80</sup>
- 2006: Federal Funding Accountability and Transparency Act of 2006 passed in the United States<sup>81</sup>
- 2000s: Access to Information Acts passed in United Kingdom, Japan, Mexico, India and Germany<sup>82</sup>
- 2000s: Corporate disclosure laws passed in the United States<sup>83</sup>
- 2000s: Open government laws passed in the United States<sup>84</sup>

## V. THE CURRENT ITERATION OF TRANSPARENCY IN GOVERNMENT

Transparency in government is popularly referred to as “open

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<http://history.house.gov/Exhibitions-and-Publications/Electronic-Technology/Television/> (last visited Dec. 29, 2014).

<sup>77</sup> *The Senate in Session, UNITED STATES SENATE*, [http://www.senate.gov/visiting/common/generic/Senate\\_in\\_session.htm](http://www.senate.gov/visiting/common/generic/Senate_in_session.htm) (last visited Dec. 29, 2014).

<sup>78</sup> ROEBUCK, *supra* note 65, at 102.

<sup>79</sup> Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C. § 552 (2012).

<sup>80</sup> E-Government Act of 2002, 44 U.S.C. § 101 (2012).

<sup>81</sup> Federal Funding Accountability and Transparency Act of 2006, 31 U.S.C. § 6101 (2012).

<sup>82</sup> ROEBUCK, *supra* note 65, at 102.

<sup>83</sup> *See, e.g.,* Public Company Accounting Reform and Corporate Responsibility Act, 15 U.S.C. §§ 7201–7266 (2012).

<sup>84</sup> *Open Government Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/open-government-guide> (last visited Jan. 14, 2015).

government.”<sup>85</sup> “Open government is [a] . . . doctrine which holds that citizens have the right to access the documents and proceedings of the government to allow for effective public oversight.”<sup>86</sup> In its current iteration, open government proponents advocate the application of the free software movement to democratic principles—referred to as open source governance—to enable interested citizens to get more directly involved in the legislative process.<sup>87</sup>

Online transparency policies can be categorized generally as mandatory, discretionary, or involuntary.<sup>88</sup> Mandatory transparency refers to policies that require agencies to release specific types of information or specific information.<sup>89</sup> Examples of mandatory transparency include online notice and comment, and Freedom of Information Act (FOIA) requests.<sup>90</sup> Discretionary transparency refers to policies that direct agencies to publish some information, but without specificity regarding what should be released.<sup>91</sup> An example of discretionary transparency is the self-selected datasets federal agencies place on Data.gov.<sup>92</sup> Involuntary transparency involves information provided through and in response to whistleblowers and leaks.<sup>93</sup>

Without question, technological advances have led to vast changes in the magnitude of information disclosed to stakeholders and the public at large. But large amounts of raw information in the

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<sup>85</sup> Justin Longo, *Open Government—What’s In A Name?*, GOVLAB, <http://thegovlab.org/open-government-whats-in-a-name/>.

<sup>86</sup> *Id.*

<sup>87</sup> Darrell M. West, *Technology as a Game-Changer*, in TRANSPARENCY AND OPEN GOVERNMENT, INTERGOVERNMENTAL SOLUTIONS NEWSLETTER (GSA Office of Citizen Services and Communications), Spring 2009, at 7, *available at* [http://www.au.af.mil/au/awc/awcgate/gsa/transparency\\_000.pdf](http://www.au.af.mil/au/awc/awcgate/gsa/transparency_000.pdf); Morley Winograd & Michael D. Hais, *Get Ready for Wiki-Government*, in TRANSPARENCY AND OPEN GOVERNMENT, INTERGOVERNMENTAL SOLUTIONS NEWSLETTER (GSA Office of Citizen Services and Communications), Spring 2009, at 33–34 (discussing online decision making by crowds), *available at* [http://www.au.af.mil/au/awc/awcgate/gsa/transparency\\_000.pdf](http://www.au.af.mil/au/awc/awcgate/gsa/transparency_000.pdf).

<sup>88</sup> Shkabatur, *supra* note 26, at 93.

<sup>89</sup> *Id.* at 93.

<sup>90</sup> *Id.* at 94.

<sup>91</sup> *Id.* at 106–07.

<sup>92</sup> *Id.* at 107.

<sup>93</sup> *Id.* at 113.

public domain, without more, may breed opacity rather than transparency. Whether or not existing online transparency policies have succeeded or will succeed in improving public accountability of government agencies is complicated and remains to be seen.<sup>94</sup>

## VI. HOW TRANSPARENCY IN GOVERNMENT IS MEASURED

### A. *Non-Government Organizations' Checklists*

Among the most frequently cited tools for measuring transparency that originated in the non-government sector over the past two decades were the Sunshine Review's ten-point Transparency Checklist,<sup>95</sup> eGEP (eGovernment Economics Project),<sup>96</sup> and BeGix (Balanced E-government index).<sup>97</sup> More recent assessment tools include those of OpentheGovernment.org and the Sunlight Foundation.<sup>98</sup> Each assessment tool uses checklists and report cards

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<sup>94</sup> *Id.* at 93.

<sup>95</sup> *Portal: Sunshine Review*, BALLOTPEDIA, [http://ballotpedia.org/Sunshine\\_Review](http://ballotpedia.org/Sunshine_Review). The Sunshine Review was a website prior to becoming its own non-profit; it merged with Ballotpedia.org in 2013. *Id.* Its publications on transparency can be found at <http://www.Ballotpedia.org>.

<sup>96</sup> *eGovernment Economics Project*, OPEN EVIDENCE, <http://www.open-evidence.com/project/a-very-interesting-project/> (last visited Dec. 31, 2014). eGEP developed measurement tools for measuring the impact of eGovernment services in various European countries. *Id.* eGEP also produced a "ground breaking study[.]" financed by the European Commission, that goes "beyond the benchmarking of services available online and aim[s] at the [measurement of] concrete impacts and outcomes." *Id.* eGEP's basic tenet is that "eGovernment programs [lead to] improved labour productivity in the public sector and, as a consequence, contribute to a number of intermediate results (better services, cost savings, etc[.]), and to the growth of [Gross Domestic Product]." *Economic Model Final Version*, EGOVERNMENT ECONOMICS PROJECT 6 (May 31, 2006), [http://www.unic.pt/images/stories/publicacoes200709/D.3.3\\_Economic\\_Model\\_Final\\_Version.pdf](http://www.unic.pt/images/stories/publicacoes200709/D.3.3_Economic_Model_Final_Version.pdf).

<sup>97</sup> *Balanced E-Government*, BERTELSMANNSTIFTUNG, 6–7 (2002), [https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/GP\\_Balanced\\_E-Government.pdf](https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/GP_Balanced_E-Government.pdf).

<sup>98</sup> OPENTHEGOVERNMENT.ORG, [www.openthegovernment.org](http://www.openthegovernment.org) (last visited Jan. 19, 2015); SUNLIGHT FOUNDATION, <http://sunlightfoundation.com> (last visited Dec. 30, 2014).

to grade government transparency.

“A transparency checklist is a . . . list of website transparency features that citizens in any part of the United States should be able to find when they visit the websites of counties, cities, school districts[,] and state agencies.”<sup>99</sup> The Sunshine Review developed a ten-point transparency checklist to measure state, county, city and school district websites based on information provided on their websites.<sup>100</sup> The Sunshine Review used the checklists to review and audit websites, grading them on criteria agreed upon by its members.<sup>101</sup> The Sunshine Review then published an annual Transparency Report Card that evaluated states, counties, municipalities, and school districts based on their websites.<sup>102</sup> For state governments, Sunshine Review’s ten-point checklist included budget, usability, elected public officials information, administrative officials information, ethics, audits, contracts, lobbying, public records, and taxes.<sup>103</sup> For county and city governments, the checklist included these same points, as well as permit and zoning information.<sup>104</sup>

EGEP is another often cited transparency measurement tool. It assesses the impact of e-government in three main areas: efficiency, democracy, and effectiveness.<sup>105</sup>

The Bertelsmann Foundation, which developed the self-assessment tool BeGix, in cooperation with Booz Allen Hamilton, conducted an international study to identify criteria of success for outstanding eGovernment performance in governmental administration.<sup>106</sup> The study’s purpose was to define what

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<sup>99</sup> BALLOTPEDIA, <http://www.Ballotpedia.org> (last visited Jan. 12, 2015).

<sup>100</sup> *Portal: Sunshine Review*, *supra* note 95.

<sup>101</sup> *Id.*

<sup>102</sup> *Transparency Report Card (2013)*, BALLOTPEDIA, [http://ballotpedia.org/Transparency\\_report\\_card\\_\(2013\)](http://ballotpedia.org/Transparency_report_card_(2013)) (last visited Jan. 12, 2015).

<sup>103</sup> *State Transparency Checklist*, BALLOTPEDIA, [http://ballotpedia.org/State\\_transparency\\_checklist](http://ballotpedia.org/State_transparency_checklist) (last visited Jan. 12, 2015).

<sup>104</sup> *Transparency Checklist*, BALLOTPEDIA, [http://ballotpedia.org/10\\_point\\_transparency\\_checklist](http://ballotpedia.org/10_point_transparency_checklist) (last visited Jan. 12, 2015).

<sup>105</sup> *eGovernment Economics Project*, *supra* note 96.

<sup>106</sup> *United Nations E-Government Survey 2014*, survey from DEP’T OF ECON. AND SOC. AFFAIRS, UNITED NATIONS 8 (2014),

constitutes good eGovernment and to outline the strategies to put electronic service delivery and digital democracy into practice.<sup>107</sup> It used a self-assessment questionnaire for e-government and e-democracy, with twenty-seven questions, six of which address transparency.<sup>108</sup>

Extrapolating primarily from various Sunshine Review Transparency Checklists, checklist points and corresponding information requirements include the following, each of which were required to be posted online:

Table 1<sup>109</sup>

CHECKLIST POINT	INFORMATION REQUIREMENT—Must be posted online
Budgets	Proposed budget Enacted budget Current budget Past three years' budgets Graphs that show spending and revenue over time Expenditure reports Check register
Usability	Consistent use of web domains Website has functional internal search Information can be found in six clicks or less Website written in "plain English" Website easy to use, easy to navigate, and information organized Databases are downloadable PDFs and other information are searchable
Public Officials Information	Contact information, including e-mail addresses Terms of office and next date of election Voting records

[http://unpan3.un.org/egovkb/Portals/egovkb/Documents/un/2014-Survey/E-Gov\\_Complete\\_Survey-2014.pdf](http://unpan3.un.org/egovkb/Portals/egovkb/Documents/un/2014-Survey/E-Gov_Complete_Survey-2014.pdf) (last visited Jan. 12, 2015).

<sup>107</sup> *Balanced E-Government*, *supra* note 97, at 13.

<sup>108</sup> *United Nations E-Government Survey 2014*, *supra* note 106, at 82.

<sup>109</sup> See *Transparency Checklist*, *supra* note 104, and *State Transparency Checklist*, *supra* note 103, to find the information in Table 1.

	Party affiliation Conflict of interest agreements Committee appointments Salaries and pension benefits for elected officials
Ethics	Must have ethics commission Must have guidelines for ethical behavior of officials Process for reporting ethics violation Results of ethics investigations
Audits	Information about regular audits Audit results for three years Schedule for audits Performance audits
Contracts	Rules governing contracts Bids and contracts for purchases over \$10,000
Lobbying	State-paid lobbying is disclosed Database of registered lobbyists with information on them Agency lobbying contracts Grants to nonprofit organizations
Public Records	Contact information, including e-mail addresses, for public information for every state agency is posted in one central location Citizens are able to request public records online Information regarding public information violations and how to pursue them Executive sessions and appropriation meetings are broadcast online and archived At least twenty-four hours' notice online is given before a public meeting is held Annual compliance surveys that measure the number of FOIA requests submitted, number fulfilled, average time for compliance and reasons for denial

The specific information for each checklist point changed from

year to year.<sup>110</sup> On some checklist points, the bar was raised to include additional items.<sup>111</sup> For example, a 2013 addition to the budget category added that proposed budgets would be posted seven days prior to being voted on.<sup>112</sup> On other checklist points, improved technology led to additional requirements.<sup>113</sup> For example, 2013 additions to the usability category included requirements for downloadable databases and that all PDFs, financial data, and legislation be searchable or be presented in a drilldown database format.<sup>114</sup>

The Sunshine Review graded states, counties, cities, and school districts on their performance, using an A through F scale, based on the checklist.<sup>115</sup> Grade scores were based strictly on websites.<sup>116</sup> To receive a passing grade for the checklist, the state office or agency had to satisfy all the “Information Requirements.”<sup>117</sup> Grades were posted, along with performance measures.<sup>118</sup> Additionally, states earning the highest grades, as well as the bottom performing states, were named.<sup>119</sup>

Another open data report card, published by the Sunlight Foundation, grades each state legislature on how well its data is made publicly available, using an A through F scale like the Sunshine Review.<sup>120</sup> States are graded on the following checklist point items, using Information Requirement measuring tools:

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<sup>110</sup> 2013 *Transparency Report Card*, Sunshine Review, at 20–21, 24–26, available at [http://sunshinereview.org/images/0/06/2013\\_Transparency\\_Report\\_Card.pdf](http://sunshinereview.org/images/0/06/2013_Transparency_Report_Card.pdf).

<sup>111</sup> *Transparency Checklist Possible Additions*, BALLOTPEDIA, [http://ballotpedia.org/Transparency\\_checklist\\_possible\\_additions](http://ballotpedia.org/Transparency_checklist_possible_additions) (last visited Jan. 12, 2015).

<sup>112</sup> 2013 *Transparency Report Card*, *supra* note 110, at 24.

<sup>113</sup> *Id.* at 13, 24–26.

<sup>114</sup> *Id.*

<sup>115</sup> 2013 *Transparency Report Card* (2013), *supra* note 102.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Open Legislative Data Report Card*, OPEN:STATES, <http://openstates.org/reportcard/> (last visited July 14, 2015).



Table 2<sup>121</sup>

CHECKLIST POINT	INFORMATION REQUIREMENT
Completeness	Bills posted Legislators posted Committees posted Votes and events posted Other relevant information, such as supporting documents, legislative journals, and schedules, posted
Timeliness	Multiple updates throughout the day, on real time or as close to it as systems allow
Ease of Access	Site well laid out; no issues with Javascript
Machine Readability	Essentially all data can be found in machine-readable formats
Use of Commonly Owned Standards	Bill text available in commonly owned standards, such as HTML or PDF
Permanence	All information is available in a permanent location and data goes back a reasonable amount of time (a decade or so)

The Sunlight Foundation uses these Checklist Points and corresponding Information Requirement items to grade states, giving full points to those that meet these standards, incremental dings to those that almost meet the standards, and, finally, no points to those

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<sup>121</sup> See *id.* to find the information in Table 2.

that completely fail to meet the standard.<sup>122</sup> Like the Sunshine Review's report card, Sunlight's report card renders a judgmental evaluation, scoring states on an A through F scale.<sup>123</sup>

*B. Government Transparency Initiatives and Their Measure*

President Obama's open government initiative of 2009 prompted federal agencies to increase their transparency.<sup>124</sup> In sum, the President directed that government should be transparent, participatory, and collaborative.<sup>125</sup> The administration committed to "disclos[ing] information rapidly in forms that the public" could find and use readily, then directed the Chief Technology Officer to coordinate the development of open government plans to executive departments and agencies.<sup>126</sup> Agencies were given 120 days to complete and submit open government plans, with a deadline of April 7, 2010.<sup>127</sup> Open government plans are largely premised on giving the public access to information through technology.<sup>128</sup> In 2013, President Obama signed an executive order that made open and machine-readable data the new default for government information.<sup>129</sup> These and other transparency initiatives have culminated in publication, by a variety of regulators, of thousands of data sets that contain information that was previously unavailable to the public.<sup>130</sup> Data.gov was set up to make the United States government's data open to the public.<sup>131</sup> Regulations.gov was set up to allow the public to submit and view comments on proposed regulations and related documents published by the federal

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Transparency and Open Government Memorandum for the Heads of Executive Departments, 74 Fed. Reg. 4685 (Jan. 21, 2009).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Shkabatur, *supra* note 26, at 80.

<sup>129</sup> *Open Government Initiative*, THE WHITE HOUSE, <http://www.whitehouse.gov/open> (last visited Dec. 31, 2014).

<sup>130</sup> Shkabatur, *supra* note 26, at 80.

<sup>131</sup> DATA.GOV, <http://www.data.gov/developers/> (last visited Dec. 31, 2014).

government.<sup>132</sup> Recovery.gov allows the public to track federal contracts and grants down to the local level.<sup>133</sup> And ITDashboard.gov was set-up to allow the public to view details of federal government information technology investments.<sup>134</sup>

Some agency websites contain much more information and are more searchable than others. More robust websites include laws and regulations, compliance and enforcement information, executive orders, policies and guidance, frequently asked questions (FAQs), links to FOIA requests, information on appeals with a link to their administrative court, and contact information.<sup>135</sup> Some websites are searchable by topic and citation.<sup>136</sup> Others contain limited contact information, consumer information, and FAQs, but no information on laws, regulations and policies, or are not easily searchable.<sup>137</sup>

A sampling of different federal government agencies' open government plans demonstrates various agency objectives identified to achieve transparency and specific tools that agencies have employed to accomplish their objectives:

The Environmental Protection Agency's (EPA) open government plan lists transparency initiatives that include information on its administration operations and environmentally related health and safety information for the public.<sup>138</sup> EPA administration information includes data publication on Data.gov; eRulemaking; monthly submissions concerning project activity, costs and schedules to OMB

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<sup>132</sup> REGULATIONS.GOV, <http://www.regulations.gov/#!/home> (last visited Dec. 31, 2014).

<sup>133</sup> RECOVERY.GOV, <http://www.recovery.gov/Pages/default.aspx> (last visited Dec. 31, 2014).

<sup>134</sup> ITDASHBOARD, <https://itdashboard.gov/provide-feedback/investment/587> (last visited Dec. 31, 2014).

<sup>135</sup> See, e.g., U.S. ENVTL. PROT. AGENCY, [www.epa.gov](http://www.epa.gov) (last visited June 21, 2015); U.S. DEP'T OF HEALTH & HUMAN SERVS., [www.hhs.gov](http://www.hhs.gov) (last visited June 21, 2015); U.S. DEP'T OF HOUSING & URBAN DEV., [portal.hud.gov](http://portal.hud.gov) (last visited June 21, 2015); SOC. SEC., [www.ssa.gov](http://www.ssa.gov) (last visited June 21, 2015); U.S. SEC. & EXCH. COMM'N, [www.sec.gov](http://www.sec.gov) (last visited June 21, 2015).

<sup>136</sup> See, e.g., U.S. ENVTL. PROT. AGENCY, *supra* note 135; U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 135; U.S. SEC. & EXCH. COMM'N, *supra* note 135.

<sup>137</sup> See, e.g., U.S. DEP'T OF TRANSP., [www.transportation.gov](http://www.transportation.gov) (last visited June 21, 2015).

<sup>138</sup> U.S. ENVTL. PROT. AGENCY, *supra* note 135.

for publication on IT Dashboard; posting of current grants; and publication of vendor and spending information.<sup>139</sup> The EPA's open government plan also provides a list of outside groups with whom it has met and received suggestions from concerning its open government plan.<sup>140</sup>

The Department of Health and Human Services' (HHS) open government plan states that it will significantly ramp up how it leverages its data to accomplish its stated objectives and serve its audiences.<sup>141</sup> Its stated plan revolves around four core principles: (1) publish more government information online in ways that are easily accessible and usable; (2) develop and disseminate accurate, high quality, and timely information; (3) foster the public's use of the information it provides; and (4) advance a culture of data sharing at HHS.<sup>142</sup>

The transparency component of the Social Security Administration's (SSA) open government plan identifies improving transparency as the agency's number one goal.<sup>143</sup> To improve transparency, SSA plans, among other things, to expand and enhance its web presence with agency program data and information; to provide targeted information to stakeholders; to use social media and other tools to share information; to conduct data exchanges with researchers and other government organizations; and to identify and release data in open, accessible and machine-readable format to the extent that protection of personal information permits sharing data.<sup>144</sup>

The Securities and Exchange Commission's (SEC) open government plan makes datasets, such as SEC Administrative Proceedings, Administrative Law Judge Initial Decisions, Public Company Bankruptcy Cases Opened and Monitored; Records and Reports, such as FOIA reports and Agency Final reports; and service contract inventory and analysis available in machine-readable

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Open Government at HHS*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/open> (last visited Aug. 6, 2014).

<sup>142</sup> *Id.*

<sup>143</sup> *Open Government Initiative*, SOC. SEC., <http://www.ssa.gov/open> (last visited Dec. 31, 2014).

<sup>144</sup> *Id.*

format.<sup>145</sup> The SEC's open government website invites public input on its Open Government Plan, including input on the information it should prioritize for publication and on the quality of information it publishes.<sup>146</sup>

The Department of Transportation's (DOT) open government plan sets strategies for publishing its data inventory, guidelines for prioritizing data releases, policies related to dataset publishing, and release of datasets on data.gov.<sup>147</sup> In its plan, DOT stresses that it considered and balanced privacy concerns with open government disclosure requirements. DOT's open government plan includes disclosure on its website of a complete inventory of its privacy reports.<sup>148</sup> Additionally, federal agencies solicit input about their plans and the data and information released pursuant to their plans from stakeholders.<sup>149</sup>

Unlike the Sunshine Review's and Sunlight's transparency report cards, federal agencies do not judge their transparency performance using A through F grades or other judgmental scorecards. Instead, federal agencies assess their own compliance with transparency measures established in their Open Government Plan.<sup>150</sup> Agencies self-assess their progress, in developmental accountability fashion, scoring themselves "meets expectation" or "does not meet expectation" on objectives they identified in their own open government plan.<sup>151</sup>

States, including the District of Columbia, also have passed open government laws and plans.<sup>152</sup> In the District of Columbia, a 2014

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<sup>145</sup> *Open Government*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/open> (last visited Dec. 30, 2014).

<sup>146</sup> *Id.*

<sup>147</sup> *Open Government*, U.S. DEP'T OF TRANSP., <http://www.dot.gov/open> (last visited Dec. 31, 2014).

<sup>148</sup> *Id.*; *Privacy*, U.S. DEP'T OF TRANSP., <http://www.dot.gov/privacy> (last visited Dec. 31, 2014).

<sup>149</sup> See, for example, DOT's open government dataset, where it elicits ratings of the utility of its dataset and also elicits suggestions related to datasets for release. DATA.GOV, <http://www.data.gov> (last visited May 24, 2015).

<sup>150</sup> *Open Government Directive*, *supra* note 129.

<sup>151</sup> *Id.*

<sup>152</sup> *Open Government Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/open-government-guide> (last visited Jan. 14, 2015) (tracks open government legislation, state by state).

Mayoral Order implemented a new Open Government policy.<sup>153</sup> Track DC provides performance information on all District agencies.<sup>154</sup> Grade DC reports on resident grading of fifteen District agencies and enables residents to provide input for the next monthly grades.<sup>155</sup> Open Data provides hundreds of data feeds on District government information.<sup>156</sup> DC regulations and DC Register provide access to municipal regulations, as well as Mayoral Orders.<sup>157</sup> Contracts and Procurement information is provided.<sup>158</sup> Budget.dc.gov provides comprehensive information about the District's budget. Public employee salary information is posted.<sup>159</sup> A centralized web portal, powered by FOIAXpress, contains the District's first citywide FOIA processing system for each agency's frequently requested public records that have been released under FOIA and are available in a FOIA Reading Room.<sup>160</sup> FOIA requesters are assigned a tracking number and can track the status of their request.<sup>161</sup> The system allows the DC government to determine whether agencies are meeting their FOIA obligations in a timely manner.<sup>162</sup>

In California, a number of laws enable both the public and the media to obtain information about public officials' activities and the decision-making process, but also require government agencies to take affirmative steps to be transparent.<sup>163</sup>

Municipal governments, too, have developed open government

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<sup>153</sup> *Transparency, Open Government and Open Data Directive*, DC.GOV, <http://dc.gov/node/871012> (last visited Jul. 21, 2014).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Open Government*, DC.GOV, <http://dc.gov/page/open-government> (last visited Jul. 29, 2014).

<sup>160</sup> *Freedom of Information Act (FOIA)*, DC.GOV, <http://dc.gov/page/freedom-information-act-foia> (last visited Jul. 29, 2014).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Transparency Laws*, INSTITUTE FOR LOCAL GOVERNMENTS, [http://www.ca-ilg.org/sites/main/files/file-attachments/ethics\\_basics\\_chapter\\_4.pdf](http://www.ca-ilg.org/sites/main/files/file-attachments/ethics_basics_chapter_4.pdf) (last visited July 14, 2015).

websites. Both Denver's and Chicago's websites illustrate the types of information municipalities post. Transparent Denver contains the city's checkbook, budget, financial reports, revenue, investments, contracts, business and property tax assessments.<sup>164</sup> The City of Chicago's website contains, among other information and data, budget and financial information, building and land information, payment and procurement information, and meeting minutes and agenda.<sup>165</sup>

The government's increased technological capabilities have led to vast changes in the magnitude of information readily available to the public, as is exhibited by open government initiatives at all levels of government. But much of the information made available in the public domain is raw information that the public may not understand unless it is deciphered by intermediaries. Whether or not intermediaries will decipher information on the scale of data released remains to be seen. Likewise, whether existing online transparency policies can succeed in producing transparency and improving public accountability of government without information deciphered by intermediaries remains to be seen.<sup>166</sup>

## VII. TRANSPARENCY IN THE COURTS

### A. *The Meaning of Transparency in the Courts*

*[Judicial transparency is] not a matter of airing dirty laundry; it's about the public having a realistic understanding of the strengths and weaknesses of the judiciary.*<sup>167</sup>

Hon. Richard Posner  
United States Court of Appeals  
for the 7th Circuit

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<sup>164</sup> DENVER THE MILE HIGH CITY, <https://www.denvergov.org/transparency> (last visited Aug. 31, 2014).

<sup>165</sup> THE CITY OF CHICAGO, <http://www.cityofchicago.org> (last visited Aug. 31, 2014).

<sup>166</sup> Shkabatur, *supra* note 26, at 109, 110, 112.

<sup>167</sup> Joel Cohen, *An Interview with Judge Richard A. Posner*, ABA JOURNAL (Jul. 1, 2014), [http://www.abajournal.com/magazine/article/an\\_interview\\_with\\_judge\\_richard\\_a\\_posner](http://www.abajournal.com/magazine/article/an_interview_with_judge_richard_a_posner).

Transparency in United States courts is not a new concept: “In all public Courts of Justice for tryall [sic] of causes Civill [sic] or criminall [sic] any person or persons . . . may freely come into and attend the said Courts . . . that Justice may not be done in a corner nor in any Covert manner.”<sup>168</sup> But clearly, the meaning of transparency in the courts has changed over the years. In 1677, transparency meant freely entering the courtroom, observing the court’s proceedings, and hearing or reading the court’s decision.<sup>169</sup> Until recently, the public was required to travel to the courthouse to view proceedings or review court records.<sup>170</sup> Today’s technology, however, means that court proceedings, court records, and all relevant aspects of court system operations and performance can be made available to the public remotely in forms the public can readily comprehend.<sup>171</sup> In short, today’s technology allows for almost complete court transparency.

*B. Reasons for Transparency in the Courts*

*(T)rust and confidence in the third branch of government is enhanced when members of the public are allowed to freely observe how the court system works.*<sup>172</sup>

Hon. Ronald Moon  
Chief Justice, Hawaii

Several factors led to current day concerns about court transparency: perception that the judiciary is closed to outsiders;

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<sup>168</sup> *The Concessions and Agreements of the Proprietors, Freeholders, an Inhabitants of the Province of West New-Jersey*, in THE FOUNDERS’ CONSTITUTION, Vol. 1, 429, 429–30 (Philip B. Kurland and Ralph Lerner eds., 2000).

<sup>169</sup> Joseph F. Anderson, *Transparent Virtue: Secrecy in the Courts: At the Tipping Point?*, 53 VILL. L. REV. 811, 828 (2008).

<sup>170</sup> D.R. Jones, *Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records*, 61 DRAKE L. REV. 375, 379–383 (Winter 2013).

<sup>171</sup> Jean Aoki, *Busy Year Ahead for Judiciary Study Committee*, KA LEO HANA (The League of Women Voters of Hawaii) 2003, at 1.

<sup>172</sup> Hon. Ronald Moon, Chief Justice, Hawaii, HAW. BAR J. (June 2003).



research findings that the public, media, and attorneys are not well-informed about many court processes (which contributes to the perception that the judiciary is closed to outsiders); and, concerns, including those of judges, about potential harm to the public.<sup>173</sup>

Proponents of court transparency make arguments in support of transparency similar to those made by proponents of open government.<sup>174</sup> (1) Transparency narrows the distance between courts and society by providing information that enables society to understand court processes, operations, challenges, and limitations.<sup>175</sup> It makes the real rules by which society is governed visible to the public.<sup>176</sup> It gives the public the ability to see what courts actually do.<sup>177</sup> (2) Transparency improves oversight in the courts. It addresses wasteful spending and productivity issues.<sup>178</sup> It also allows the public to better evaluate judges. In a transparent court system, evaluators have more to work with. Judge-specific information can be provided on cases heard, cases decided, case backlog, percentage of decisions reversed on appeal, reversals in unreported opinions, frequency of appeals from judge's decisions, or complaints. (3) Transparency expands the power of citizens and legislators over the courts.<sup>179</sup> It enhances legislative control over courts by showing legislatures and the public how courts implement laws and give policymakers feedback necessary to fine tune the system.<sup>180</sup> Transparency could reform the court system in accordance with policy makers' preferences. (4) Transparency breaks up knowledge

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<sup>173</sup> See Anderson, *supra* note 169, at 823 (discussing the trend for litigants to ask for protective orders and the sealing of cases and settlements where public safety or the public interest might be adversely affected); see also Mark Puente, *Baltimore Settlements on Police Brutality More Restrictive Than in Other Cities*, BALTIMORE SUN, Dec. 28, 2014, <http://www.baltimoresun.com/news/maryland/bs-md-settlement-confidentiality-20141227-story.html%23page=1#page=1> (comparing Baltimore's restrictive policy on police brutality case settlements to policies in open-records states).

<sup>174</sup> William C. Vickrey, Joseph L. Dunn & J. Clark Kelso, *Access to Justice: A Broader Perspective*, 42 LOY. L.A. L. REV. 1147, 1151–53, 1160 (2009).

<sup>175</sup> LoPucki, *supra* note 6, at 510.

<sup>176</sup> *Id.* at 497.

<sup>177</sup> *Id.* at 494.

<sup>178</sup> Vickrey, *supra* note 174, at 1178.

<sup>179</sup> LoPucki, *supra* note 6, at 496–497.

<sup>180</sup> *Id.* at 495–96.

monopolies by making facts and knowledge that are produced in litigation readily available.<sup>181</sup> It levels the litigants' playing field by making data accessible to all. Currently some databases are accessible only to those with the ability to gather and analyze them. An example is the database of claims and outcomes against insurance companies maintained and shared within the insurance industry.<sup>182</sup> (5) Transparency allows the public to see whether the precautions they take for supposed legal reasons are the right ones.<sup>183</sup> (6) Transparency also prevents potential harm to the public by opening up cases that might have been sealed in the past.<sup>184</sup> (7) Transparency enables lawyers and parties to predict the outcomes of their cases.<sup>185</sup> It promotes the settlement of the most predictable cases. Predictability will tend to increase the social utility of the litigation that occurs.<sup>186</sup> By focusing the system's resources on the least predictable cases, overall efficiency will improve. (8) Transparency fosters and improves the level of trust in courts and the legitimacy of judges and others in the court system.<sup>187</sup> (9) Transparency fosters judicial independence as well as accountability.<sup>188</sup> (10) Transparency enables clients to identify and hire the most effective lawyers.<sup>189</sup> It can reduce or prevent many kinds of lawyer malpractice and litigant error.<sup>190</sup> For example, a transparent court system might alert the filing lawyer or self-represented litigant of the insufficiency of a filed document in the same way that the order form on a commercial website alerts buyers that they have not furnished a required e-mail address or all sixteen digits of their credit card number. Such a system could immediately afford the filer the opportunity to correct the error. (11) Transparency overcomes generalized perceptions that

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<sup>181</sup> *Id.* at 510.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 481.

<sup>184</sup> Anderson, *supra* note 169, at 814–815, 825–828.

<sup>185</sup> LoPucki, *supra* note 6, at 498, 506.

<sup>186</sup> *Id.* at 506.

<sup>187</sup> Natalie Gomez-Velez, *Internet Access to Court Records—Balancing Public Access and Privacy*, 51 LOY. L. REV. 365, 369 (Fall 2005).

<sup>188</sup> LoPucki, *supra* note 6, at 531–533.

<sup>189</sup> *Id.* at 512.

<sup>190</sup> *Id.* at 510–513.

link courts to corruption, political favoritism, and inefficiency.<sup>191</sup> It exposes and reduces corruption and impropriety, with the notion that the corrupt nature of some transactions is apparent only to observers with other, privately held information.<sup>192</sup> In short, transparency enables the public to police the court system. (12) Transparency promotes private sector economic planning and, ultimately, increases productivity through court system predictability.<sup>193</sup>

### C. *Concerns About Transparency in the Courts*

Concerns about implementing court transparency measures and the level of transparency that should be provided abound among court administrators, the bench, the bar, and others. Those concerns include similar arguments raised by opponents of open government, but also concerns unique to courts: (1) Courts' technological capabilities vary and those courts that are technologically challenged may not have the capabilities needed to publish information and data.<sup>194</sup> (2) Transparency will be costly.<sup>195</sup> Budget constraints may minimize a court's ability to publish and update information and data.<sup>196</sup> Limitations of human resource capacity may constrict a court's ability to publish and update information and data.<sup>197</sup> (3) Those with greater financial ability will reap greater advantages from transparency because they will be able to afford more sophisticated analysis.<sup>198</sup> Data alone, without useful views, has little meaning. (4) Access to information and data will not resolve the public's limited knowledge about the judicial process and the appellate process.<sup>199</sup> (5) Access will not be equal.<sup>200</sup> There is inability on the part of some litigants to access the Internet. Additionally, fees for access,

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<sup>191</sup> *Id.* at 494.

<sup>192</sup> *Id.* at 494–95.

<sup>193</sup> Herrero & Lopez, *supra* note 4, at 3–4; LoPucki, *supra* note 6, at 494–513; Anderson, *supra* note 173, at 814–816.

<sup>194</sup> Herrero & Lopez, *supra* note 4, at 4.

<sup>195</sup> *Id.* at 36.

<sup>196</sup> *Id.* at 10.

<sup>197</sup> *Id.*

<sup>198</sup> LoPucki, *supra* note 6, at 514.

<sup>199</sup> Gomez-Velez, *supra* note 187, at 415.

<sup>200</sup> LoPucki, *supra* note 6, at 514.

although relatively small, might be prohibitive for some litigants and some members of the public. (6) Two embarrassing factors may surface: identity of the judge and quality of legal representation may prove to be the most powerful predictors of who wins in court.<sup>201</sup> (7) The public's ability to predict case outcome as a result of transparency may not significantly reduce litigation.<sup>202</sup> (8) Settlements may be deterred if settlement agreements are open to the public and court-ordered sealing is not allowed.<sup>203</sup> (9) Transparency will harm litigants by exposing them to embarrassment by making previously difficult-to-obtain public record information about individuals more easily available.<sup>204</sup> (10) Privacy and security issues must be addressed. Privacy of litigants and others involved in cases will be invaded by making previously difficult-to-obtain public record information about individuals readily available.<sup>205</sup> Parties and witnesses could be exposed to the risk of identity theft and other harms.<sup>206</sup> (11) Transparency could put public pressure on judges to decide cases differently in ways that deprive them of judicial independence.<sup>207</sup> Legislators may threaten judges with budget cuts, job cuts, or impeachment. Interest groups may threaten judges with political campaigns that could remove them from office. The media may incite the public against judges. (12) Disgruntled litigants or political extremists may threaten judges with violence.<sup>208</sup> (13) Judges will be in a goldfish bowl. Transparency might reveal case backlogs, judges seeking to attract particular kinds of cases, or favoritism to particular litigants. Work ethic problems for some judges might be exposed. (14) Courts' wasteful spending might be revealed.<sup>209</sup> (15) Transparency will facilitate the copying of lawyer's work product. (16) Access may result in flight to private

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<sup>201</sup> *Id.* at 508.

<sup>202</sup> *Id.* at 507.

<sup>203</sup> Anderson, *supra* note 169, at 815–816.

<sup>204</sup> LoPucki, *supra* note 6, at 523–526.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 522.

<sup>207</sup> *Id.* at 531.

<sup>208</sup> *Id.* at 531.

<sup>209</sup> Vickrey, *supra* note 174, at 1190–1191 (discussing generally that courts need to prove they will be disciplined stewards of public money).

adjudication.<sup>210</sup>

Notwithstanding these concerns, courts have moved dramatically away from court-ordered secrecy and toward greater transparency.<sup>211</sup> Forty-one jurisdictions have now adopted some type of anti-secrecy measures, either by legislation or court rule.<sup>212</sup> And judges are much more circumspect about court-ordered secrecy.<sup>213</sup>

#### *D. Intersection of Access to Justice and Court Transparency*

A separate and independent judiciary is one of the cornerstones of our democracy. But to ensure the rights of the people, justice must be accessible. The traditional view on access to justice equates people's ability to access competent legal counsel, regardless of their ability to pay.<sup>214</sup> That traditional view, however, so narrowly circumscribes access to justice that it imperils access to justice for the people the justice system serves.

By narrowly defining access to justice vis-à-vis the right to competent counsel, a much larger piece necessary to realizing access to justice is missed. There are other, more elusive factors that impact access to justice, among them courts' atmosphere, user-friendliness, impartiality, and public trust and confidence in courts.<sup>215</sup> At its most fundamental level, access to justice necessarily concerns the availability of judges, court facilities, and court personnel. "For there to be meaningful access to justice, the courts and the entire justice system—broadly conceived—must be open, available, and accessible."<sup>216</sup>

Openness, availability and accessibility are inherent to transparency and open government, by definition.<sup>217</sup> These same characteristics are fundamental to meaningful access to justice. Thus, transparency in courts also holds promise for enhancing access

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<sup>210</sup> Herrero & Lopez, *supra* note 4, at 3–4; LoPucki, *supra* note 6, at 513–516; Anderson, *supra* note 173, at 816–820.

<sup>211</sup> Anderson, *supra* note 173, at 825.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Vickrey, *supra* note 174, at 1153–1154.

<sup>215</sup> *Id.* at 1148.

<sup>216</sup> *Id.* at 1154.

<sup>217</sup> See *supra* text accompanying notes 13–22.

to justice and judicial accountability. “Approaching checks and balances from a different perspective reveals promising new avenues for collectively enhancing access to justice and judicial accountability.”<sup>218</sup>

### *E. Transparency in Courts Outside the United States*

For more than a decade, rule of law initiatives that monitor and support reforms to fight corruption and enable greater protection of citizens’ rights have been spearheaded by organizations such as the ABA ROLI and the World Bank Institute.<sup>219</sup> Initiatives to promote the democratic operation of government entities, including the justice system, have included projects aimed at documenting good practices and positive experiences involving access to information and transparency to the public.<sup>220</sup>

Researchers involved in these initiatives reviewed access to information and transparency as they relate to the internal operations and administrative aspects of the judiciary.<sup>221</sup> In assessing public access to information and transparency of courts, researchers distilled categories of information and various tools for courts’ use in achieving access to information and transparency.<sup>222</sup>

Table 3<sup>223</sup>

Categories	Tools	Experiences
Information on the management of public funds	Access to information on procurement.	Chile: Public Procurement Law.
	Access to bidding documents.	Guatemala: Information on procurement processes.
	Access to budgetary	

<sup>218</sup> Vickrey, *supra* note 174, at 1151.

<sup>219</sup> Herrero & Lopez, *supra* note 4, at v; *Our Origins & Principles*, *supra* note 5.

<sup>220</sup> Herrero & Lopez, *supra* note 4, at 1.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 39–40.

<sup>223</sup> See *id.* to find the information in Table 3.

	information.	Mexico: Budgetary information on the Internet.
Information on the appointment of judges and officials	<p>Civil society participation in the mechanisms to select judges.</p> <p>Publicity of the various stages in selection and removal mechanisms.</p> <p>Broad dissemination of the list of applicants and their background.</p>	<p>Argentina: Transparency and participation in the mechanisms to appoint judges.</p> <p>Colombia: Participation in the election of Constitutional Tribunal Justices.</p>
Information on assets and income disclosure statements	Access to income and assets disclosure statements.	Argentina: Public Ethics Law.
Access to statistics	<p>Statistical information in the Internet and in official publications (Annual Statistical Reports etc.).</p> <p>Information on number of cases filed, pending and completed over a period of time; duration of cases; number of sentences per subject; budget and costs; number of staff; etc.</p>	Costa Rica: Statistics on the work of the Judiciary. Annual Statistical Reports.
Publicity of the sentences of the Superior Courts of Justice	<p>Sentences available on the Judiciary's website.</p> <p>Dissemination of the work of the Superior Courts through the mass</p>	<p>Mexico: Publication of sentences on the website.</p> <p>Argentina: "Court</p>

	media.	<p>Rulings within Citizens Reach”.</p> <p>United States: Coverage of court cases.</p> <p>Regional: Justice and the media.</p>
Access to case files in case of corruption of public officials	Consultation and access to court case files.	Argentina: Participation of NGOs in corruption cases.
Information on the internal working of Supreme Courts	<p>Information on the flow of files within the courts.</p> <p>Information on disciplinary procedures against judges.</p>	Costa Rica: Publication of the minutes of the Court Plenum and the Superior Council, and information on disciplinary proceedings against judges.
Transparency in court sessions and mechanisms to enhance civil society participation	<p>Regulation of <i>Amicus Curiae</i>.</p> <p>Establishment of hearings to examine major cases.</p> <p>Dissemination of court sessions.</p> <p>Creation of judicial observatories.</p> <p>Publicity of oral hearings in trials with public relevance.</p>	<p>Argentina: Use of <i>Amici curiae</i> by the Argentine Supreme Court.</p> <p>Mexico: Use of public hearings in cases of institutional relevance.</p> <p>Mexico: TV Channel on judicial issues.</p> <p>Brazil: Radio channel on judicial</p>



		<p>issues.</p> <p>Colombia: Observatory of Constitutional Justice.</p> <p>Peru: TV broadcasting of Fujimori's trial.</p>
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ABA ROLI initiatives to strengthen court transparency and accountability have included establishment, monitoring and evaluation of performance management systems, and implementation of electronic court monitoring systems in countries such as the Philippines.<sup>224</sup>

#### *F. Public Information that Courts Currently Provide*

Through longstanding common law, citizens have the right to review court proceedings, including court records, opinions, and orders.<sup>225</sup> “The link between access to court records and access to judicial proceedings emanates from the notion that access to court records informs those citizens unable to attend court proceedings.”<sup>226</sup> With some exceptions, court proceedings and case files are open to the public.<sup>227</sup> Exceptions to open access generally include juvenile, child support and other case types that are cloaked with confidentiality by statute or court rule in general jurisdiction courts, and public benefits and other case types cloaked with confidentiality by statute in administrative courts.<sup>228</sup> Additionally, case files, in

<sup>224</sup> ABA Rule of Law Initiative, AM. BAR ASSOC. [http://www.americanbar.org/advocacy/rule\\_of\\_law.html](http://www.americanbar.org/advocacy/rule_of_law.html) (last visited Dec. 31, 2014).

<sup>225</sup> Jones, *supra* note 170, at 376, 379.

<sup>226</sup> 170*Id.* at 381; *see also* Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1066–67 (3d Cir. 1984); United States v. Criden, 648 F.2d 814, 820 (3<sup>rd</sup> Cir. 1981); United States v. Mitchell, 551 F.2d 1252, 1257–58 (D.C. Cir. 1976).

<sup>227</sup> Jones, *supra* note 170, at 376.

<sup>228</sup> Gomez-Velez, *supra* note 187, at 412.

whole or in part, may be placed under seal by judges' orders upon request of the litigants.<sup>229</sup> Similarly, court budgets and statistics are available to the public.<sup>230</sup> But courts vary in how readily available information is made available to the public.<sup>231</sup>

Over the past ten years, a number of states, including the District of Columbia, have amended their laws to require public bodies to make records, including court opinions and orders, available on the internet or by other electronic means.<sup>232</sup> For example, California requires that "[a] court that maintains the following records in electronic form must provide electronic access to them, both remotely and at the courthouse, to the extent it is feasible to do so: . . . (2) [a]ll records in civil cases, except those listed in (c)(1)–(9)."<sup>233</sup> The District of Columbia requires that final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases be made available to the public on the Internet, on a website, or by other electronic means.<sup>234</sup>

### G. *Transparency in Federal Courts*

Federal courts have been at the forefront of affirmatively providing access to information. Over the past decade, technology has transformed the federal courts. The federal judiciary began design of its electronic case filing and case management system (CM/ECF) in the 1990s and began implementation in 2001.<sup>235</sup> The

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<sup>229</sup> Forty-one jurisdictions have adopted some type of anti-secrecy measure, whether by legislation or court rule. See Anderson, *supra* note 173, at 825.

<sup>230</sup> See *Statistics & Reports*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports> (last visited July 14, 2015), for federal courts' budgets and statistics. State courts' budgets and statistics are posted on their websites, usually under their administrative office tab. The National Center for State Courts provides links to all state court websites. *State Court Web Sites*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/Information-and-Resources/Browse-by-State/State-Court-Websites> (last visited July 14, 2015).

<sup>231</sup> Jones, *supra* note 170, at 388–389.

<sup>232</sup> *Id.* at 377.

<sup>233</sup> CAL. RULES OF COURT, Rule 2.503(b) (West 2015).

<sup>234</sup> D.C. CODE §§ 2–536(a)(3), (b) (2014).

<sup>235</sup> 2014 Year-End Report on the Federal Judiciary, U.S. SUPREME COURT 1, 6 (Dec. 31, 2014), <http://www.supremecourt.gov/publicinfo/year-end/2014-year-endreport.pdf>.

federal courts have moved from paper to electronic filing, resolved daunting privacy problems, and made their files available on PACER—thereby becoming the world’s most transparent court system.<sup>236</sup> As explained on the United States Courts website, for every Third Branch court, “all dockets, opinions, and case file documents can be accessed world-wide in real time, unless they are sealed or otherwise restricted for legal purposes. This level of transparency and access to a legal system is unprecedented and unparalleled.”<sup>237</sup>

As with other government branches, federal courts’ transparency is made possible and delivered, to a large extent, through the Internet. Each Federal court has a website. Websites contain court rules, court forms, court opinions, unsealed documents, pro se help, lists of judges with their biographies, judges’ calendar assignments and judges’ daily calendars, which are continuously updated.<sup>238</sup> Some websites include a “Judges Information” tab, which provide information like recusal lists and annual disclosure reports.<sup>239</sup> Websites allow for access to case filings electronically, through the courts’ case management systems, as well as access to digital audio recordings of proceedings.<sup>240</sup> At least one federal court website displays court governance structure and operations, including mandated regular meetings among judges and stakeholders.<sup>241</sup>

The second phase of this transformation toward transparency is under discussion and, to a lesser extent, underway in a go-slow approach. It involves the use of relational forms and computer algorithms from which court data can be extracted automatically and

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<sup>236</sup> LoPucki, *supra* note 6, at 481, 485.

<sup>237</sup> *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, U.S. COURTS (Dec. 9, 2013), <http://news.uscourts.gov/25-years-later-pacer-electronic-filing-continue-change-courts>.

<sup>238</sup> *Id.*

<sup>239</sup> See, for example, the disclosures for each of the judges at *Judge Information*, U.S. DIST. COURT FOR THE DIST. OF NEB., <http://www.ned.uscourts.gov/attorney/judges-information> (last visited Sept. 1, 2014).

<sup>240</sup> Richard G. Kopf, *The Courts, the Internet, E-filing and Democracy*, 56 U. OF NEW BRUNSWICK L.J. 40 (2007).

<sup>241</sup> *In the Matter of Court Governance*, U.S. DIST. COURT FOR THE DIST. OF NEB., Nov. 5, 2004, [http://www.ned.uscourts.gov/internetDocs/pom/orders/GO\\_2004-16.pdf](http://www.ned.uscourts.gov/internetDocs/pom/orders/GO_2004-16.pdf).

case outcomes predicted based on statistical analysis.<sup>242</sup> Relational forms are the familiar formats used in data management and spreadsheet programs.<sup>243</sup> Each piece of data is tagged.<sup>244</sup> Statistical analysis would include case characteristics such as identities of judges and lawyers in a case, neither of which play a role in traditional legal analysis.<sup>245</sup>

These methods of analysis are a marked departure from the traditional method of analyzing court opinions, statutes, regulations, and commentary that we use to predict case outcomes. Its proponents argue that data analyses by researchers will prove to be a landmark in court transparency.<sup>246</sup> Researchers, they suggest, will be provided by volunteers from academia, at no cost to the courts or litigants.<sup>247</sup>

Federal courts' marked transformation toward transparency has not included the Supreme Court.<sup>248</sup> But in his *2014 Year-End Report on the Federal Judiciary*, Justice Roberts reports that the Court's new online system will make petitions, responses, briefs, and other public documents filed with the Court available to the public online as soon as 2016.<sup>249</sup> At present, the Court makes only paper copies available to the public in-person at the Court; they are not available at the Court's website.<sup>250</sup> In his Year-End Report, Justice Roberts does not directly address other calls for more transparency of the Court, such as televised oral arguments or same-day audio recordings of court sessions, nor does he embrace rapid movement toward

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<sup>242</sup> Lopucki, *supra* note 6, at 483–484.

<sup>243</sup> *Id.* at 484.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 483.

<sup>246</sup> *Id.* at 537.

<sup>247</sup> Lynn M. LoPucki, *Court Transparency*, UCLA SCHOOL OF LAW RESEARCH PAPER NO. 08–08, 72, available at <http://ssrn.com/abstract=1104744>; LoPucki, *supra* note 6, at 491.

<sup>248</sup> For example, compare the opinions provided under Opinions Tab for the Supreme Court at U.S. SUPREME COURT, <http://www.supremecourt.gov> (last visited July 14, 2015), to those of the federal circuit court opinions archive at *Opinions*, U.S. COURT OF APPEALS FOR THE D.C. CIR., <http://www.cadc.uscourts.gov/internet/opinions.nsf>. See also *2014 Year-End Report on the Federal Judiciary*, *supra* note 235, at 7.

<sup>249</sup> *Id.* at 7.

<sup>250</sup> *Id.*

transparency.<sup>251</sup> Instead, he states that “Judges and court executives are understandably circumspect in introducing change to a court system that works well until they are satisfied [that] they are introducing change for the good.”<sup>252</sup>

#### *H. Transparency in State Courts*

As a whole, state courts’ movement toward online transparency has been a slower transition than that of federal courts and varies among different courts. This can be attributed, at least in part, to variations in state court structures, management, and funding.

In the late twentieth century, state courts began to consider the use of technology to manage documents and improve court service to the public.<sup>253</sup> During the late 1990s and early 2000s, state courts began to develop and adopt policies concerning public access to electronic records.<sup>254</sup> Reports issued by the National Center for State Courts (NCSC), as well as reports and guidelines issued by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) informed and provided guidance to state courts on issues raised by electronic access to court records.<sup>255</sup> Since then, many state courts have implemented electronic filing and case management systems, or are in the process of doing so.<sup>256</sup> As they have implemented electronic filing and case management systems, state courts have had to develop approaches to providing access to online records that address the tension between public access and protection of personal data and information.<sup>257</sup> In doing so, courts have struggled with developing policies on access, privacy, and security, and then aligning policy and technology.<sup>258</sup>

In 1995, the NCSC published two reports to provide guidance to courts on electronic access: the Kilpatrick Report and the Jennen

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 11.

<sup>253</sup> Jones, *supra* note 170, at 384.

<sup>254</sup> *Id.* at 387.

<sup>255</sup> *Id.* at 384–393.

<sup>256</sup> *Id.* at 390.

<sup>257</sup> *Id.* at 388–389.

<sup>258</sup> *Id.* at 383–84.

Report.<sup>259</sup> The Kilpatrick Report examined electronic access to court information and records and addressed issues related to implementation of electronic access systems.<sup>260</sup> In 1995, NCSC published a second report, The Jennen Report, which addressed how to develop policies for access to records in a court system, extensively discussing the conflict between open access and privacy, as well as its impact on electronic record access policies.<sup>261</sup> The Jennen Report concluded that existing laws were inadequate for guiding states in developing policies.<sup>262</sup> The Jennen Report did not offer proposed changes to laws, but offered guidelines for courts to consider when developing policies.<sup>263</sup> It predicted that the transition from paper to electronic records would take many years and proceed at different rates in different courts.<sup>264</sup> In 2002, the CCJ and COSCA issued a report and adopted guidelines (the Guidelines) for developing access policies for court records.<sup>265</sup> The Guidelines reflect state court policies, including those adopted without consulting the Guidelines.<sup>266</sup> The Guidelines cover many aspects of access to court records.<sup>267</sup> They are not model policies and have not been updated since 2002, but have been used as a resource by many states and serve as a starting point in drafting policies.<sup>268</sup> The Guidelines create a presumption of openness to court records, but offer variations on methods of access.<sup>269</sup>

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<sup>259</sup> *Id.* at 384.

<sup>260</sup> Kevin P. Kilpatrick, *The Electronic Handshake: Public Access to Court Databases 2*, NAT'L CTR. FOR STATE COURTS (1995), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=224>; Susan M. Jennen, *Privacy and Public Access to Electronic Information: A Guide to Policy Decisions for State Courts*, NAT'L CTR. FOR STATE COURTS (1995), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=222>.

<sup>261</sup> Jennen, *supra* note 260.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> Jones, *supra* note 170, at 391.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 391.

<sup>268</sup> *Id.* at 393.

<sup>269</sup> *Id.* at 389, 392.

Two dramatically different approaches to methods of public access to records in state courts have emerged, referred to by one author who advocates open electronic access as the “public-is-public” approach and the “practical-obscurity” approach.<sup>270</sup> Under the public-is-public approach, the public views all records, regardless of format or location.<sup>271</sup> Any records available at the courthouse are also available online.<sup>272</sup> Any restrictions on access that apply to records at the courthouse also apply to electronic records.<sup>273</sup> In contrast, under the “practical-obscurity” approach, courts focus on concerns related to exposure of documents made available online.<sup>274</sup> Under this approach, courts provide access to print records at the courthouse, and perhaps electronic records in a kiosk at the courthouse, but otherwise do not provide access to electronic records, in order to limit public access to records.<sup>275</sup> Variations on these approaches allow remote access only to certain types of users, such as judges, court personnel, litigants, and counsel.<sup>276</sup>

Like federal courts, state courts have debated privacy and security concerns posed by the public’s access to court information via the Internet.<sup>277</sup> State courts developed policies at times when they did not have—only anticipated—operational online filing and electronic records systems.<sup>278</sup> In this way, the process followed by state courts was completely different from that followed by the federal courts, where policies were developed alongside an operational electronic filing and records system.<sup>279</sup> Over time, many state courts have implemented electronic filing systems and, consequently, more court records are available online.<sup>280</sup> Today, state courts continue to

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 394.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 389.

<sup>277</sup> Gomez-Velez, *supra* note 187, at 430–434.

<sup>278</sup> Jones, *supra* note 170, at 387.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 377–378.

develop, revise, and implement policies concerning access to electronic records.<sup>281</sup>

Some courts have taken methodical approaches to align policy and technology before allowing public access to electronic records.<sup>282</sup>

The New Jersey courts, for example, proceeded cautiously, and with deliberation, to align policy and eCourt technology before deploying its court system-wide or to the public.<sup>283</sup> First, New Jersey's Chief Justice established a special committee, composed of judges, attorneys, managers from other courts, and private industry technology managers, with a stated vision of transforming the courts to make them more accessible, more transparent, and more convenient for all users.<sup>284</sup> Over a period of nine months, the special committee developed thirty recommendations on judicial business requirements, technology, and finance for a comprehensive electronic platform for e-filing, case management, records management, and providing the public with access to court records while maintaining the security of documents and data when appropriate.<sup>285</sup> The special committee's June 2009 report recommended, among other things, development of a comprehensive e-filing system, adoption of standard formats for e-filing, and providing the public with access while maintaining the security of documents and data when appropriate.<sup>286</sup>

States have developed varying policies on both the degree of access provided and the level of detail concerning classes of information that are categorically made available to the public or restricted from public access.<sup>287</sup> Some states—at least initially—declined to place case record information online. For example, Massachusetts directed its trial courts to confine initial dissemination of records to dockets only.<sup>288</sup> Dissemination of actual case file

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<sup>281</sup> *Id.* at 378, 384–390.

<sup>282</sup> *Id.* at 421.

<sup>283</sup> N.J. COURTS, REPORT OF THE SUP. CT. SPECIAL COMM. ON ELEC. FILING TO CHIEF JUSTICE STUART RABNER (June 15, 2009), *available at* <http://www.judiciary.state.nj.us/notices/efile.pdf>.

<sup>284</sup> *Id.* at 1–2, 7–8, 37.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Gomez-Velez, *supra* note 277, at 430.

<sup>288</sup> *Id.* at 431.



documents was left to a second phase of dissemination.<sup>289</sup> In contrast, Indiana state courts adopted a policy that provides for remote electronic access to party indexes, listings of new case filings, chronological case summaries, calendars or dockets of court proceedings, and judgments, orders or decrees, but excluded specific categories of information, such as information excluded by federal and state law, rule, or specific court order.<sup>290</sup>

State courts' websites demonstrate the vast amount of information the public can now access remotely. The Alabama Unified Judicial System website includes, among other things, quick links to e-filing, rules, rule changes, and FAQs.<sup>291</sup> Colorado's State Court System's website includes, among other things, explanation on its various courts and educational resources.<sup>292</sup> The Vermont courts' website includes, among other things, court forms, proposed and promulgated rules, statistics, and electronic filing.<sup>293</sup>

State court websites are suggestive of states that may take the public-is-public approach that allows the public to remotely access records, the practical obscurity approach that requires the public to view records at the courthouse, and a variation of these approaches. The Florida State Courts' website allows the public to search thousands of official records across counties online.<sup>294</sup> The Montana State Court website directs the public to visit the courthouse to review and obtain copies of records.<sup>295</sup> A variation on the two approaches is suggested by the District of Columbia Courts' website, which allows the public to view case docket entries, but not actual case records.<sup>296</sup>

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 431.

<sup>291</sup> ALA. JUDICIAL SYS., <http://judicial.alabama.gov> (last visited Jan. 19, 2015).

<sup>292</sup> COLO. JUDICIAL BRANCH, <http://www.courts.state.co.us> (last visited Jan. 19, 2015).

<sup>293</sup> VT. JUDICIARY, <https://www.vermontjudiciary.org/default.aspx> (last visited Jan. 19, 2015).

<sup>294</sup> *Official Records, MY FLA. CTY.*, [https://www.myfloridacounty.com/official\\_records](https://www.myfloridacounty.com/official_records) (last visited Jan. 19, 2015).

<sup>295</sup> MONT. JUDICIAL BRANCH, <http://courts.mt.gov> (last visited Jan. 19, 2015).

<sup>296</sup> D.C. COURTS, <http://www.dccourts.gov> (last visited Jan. 19, 2015).

*I. Administrative Courts' Online Transparency*

Administrative courts' websites suggest the same divergence among themselves as seen among state courts with respect to their pace toward online transparency, information provided, and approaches in allowing public access. By way of example, the Alaska Office of Administrative Hearings' website includes, among other things, annual reports, statutes and regulations, code of conduct, and decisions.<sup>297</sup> The Arizona Office of Administrative Hearings' website includes, among other things, rules and statutes, ethical standards, and statistics.<sup>298</sup> The District of Columbia's Office of Administrative Hearings includes, among other things, rules and laws, downloadable forms, and language access information.<sup>299</sup> Among these three administrative courts, only the Arizona Office of Administrative Hearings' website allows public access to case records.

VIII. ADMINISTRATIVE COURTS IMPACTED BY ADMINISTRATIVE  
AGENCY TRANSPARENCY

Because administrative courts' primary role is to adjudicate administrative agency appeals, the transparency of the agencies whose cases they adjudicate impacts administrative adjudication. The demand for public accountability of administrative agencies is primarily satisfied through regulatory transparency, but regulatory transparency is rarely defined. Which types of regulatory information should be made public and how this information should be presented are often left unanswered.<sup>300</sup>

It is not unusual for administrative law judges to report, either in their written decisions or anecdotally, that the first-time litigants

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<sup>297</sup> ALASKA DEP'T OF ADMIN., <http://doa.alaska.gov/oah> (last visited Jan. 19, 2015).

<sup>298</sup> ARIZ. OFFICE OF ADMIN. HEARINGS, <http://www.azoah.com> (last visited Jan. 19, 2015).

<sup>299</sup> OFFICE OF ADMIN. HEARINGS, <http://oah.dc.gov> (last visited Jan. 19, 2015).

<sup>300</sup> Shkabatur, *supra* note 26, at 84 (citing MICHAEL W. DOWDLE, PUBLIC ACCOUNTABILITY: CONCEPTUAL, HISTORICAL, AND EPISTEMIC MAPPINGS, in PUBLIC ACCOUNTABILITY: DESIGN, DILEMMAS AND EXPERIENCES 1, 3 (Michael W. Dowdle ed., 2006)).

before them are made aware of the requirements of an agency's regulations or obtain a copy of a regulation is during a fair hearing.

The public's knowledge of an agency's regulations and policies often hinges on the transparency of the agency itself, including whether the agency has developed user-friendly accessible information for the public.<sup>301</sup> Limited accessibility to an agency's regulations, policies, and practices can lead to limited public knowledge of those regulations and policies.<sup>302</sup> This, in turn, leads to the public's limited ability or even inability to comply with regulations and policies.<sup>303</sup> Or, specific to agency type, limited accessibility can lead to the public's inability to access agency services all together.<sup>304</sup>

Limited access to, and consequentially limited public knowledge of, agency regulations and policies is evidenced in administrative courts on a routine basis. At fair hearings, for example, administrative law judges must address enforcement cases in which litigants are informed of regulations' requirements for the first time in the midst of the hearing, and public benefit cases in which recipients were not informed of agency policy, but by which they were expected to abide by or lose their benefits.<sup>305</sup>

As open government momentum pushes federal, state, and municipal agencies toward greater transparency, largely measured through accessibility to and content of their websites, administrative courts may see more informed litigants as well as other impacts on the fair hearing process.

#### IX. PROPOSED TRANSPARENCY CHECKLISTS FOR ADMINISTRATIVE COURTS

Some, but not all, of the factors used for evaluating government agency transparency can be borrowed as tools to evaluate

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<sup>301</sup> *Id.* at 83.

<sup>302</sup> *Id.* at 84.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Based on my experience adjudicating hundreds of administrative agency enforcement and public benefits cases, litigants frequently learn about agency regulations and policies for the first time while at the fair hearing they have requested.

administrative court transparency. The checklist points of budget, website usability, contracts, and public records are unquestionably effective measures for court administration transparency. In fact, website usability and online posting of clearly written information on checklist point information, such as court rules, court forms, and operational information, can improve court efficiency and reduce burdens on court administrative staff. Other checklist points, such as lobbying, are generally not relevant to courts.

Administrative courts, too, perform different functions than the other government branches that develop or implement laws.<sup>306</sup> The day-to-day primary mission of courts is to resolve disputes between litigants by applying laws that other government branches have developed or implemented. For this reason, checklist points used to measure transparency in other government branches are largely checkbook in nature and, therefore, do not fully capture court administration and judicial functions and thus fall short of measuring administrative courts' transparency.

To enhance the transparency of court administration and judicial functions, checklist points and information requirements, targeted to meet public need by giving context and answering questions, might include the following:

Table 4

CHECKLIST POINT	TOOL/INFORMATION REQUIREMENT
Category	
Court Administration	
Court Authority and Procedures	<p>Enabling statute of administrative court is posted</p> <p>List of case types, including agencies, that administrative court hears, together with authority conferring jurisdiction, is</p>

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<sup>306</sup> See generally RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE (5<sup>th</sup> ed. 2010).

	<p>posted</p> <p>Court rules are available online</p> <p>Information is current</p>
Court Administration Responsibilities	<p>Organizational chart is posted online</p> <p>Organizational chart is regularly updated</p> <p>Roles and responsibilities are posted online</p> <p>Information is current</p>
Court Administration Information	<p>Terms of office and next date of election or appointment are posted</p> <p>Party affiliation, if any, is disclosed</p> <p>Conflict of interest agreements are posted online</p> <p>Committee appointments are posted online</p> <p>Salaries and pension benefits are disclosed</p>
Reports	<p>Annual reports are posted</p> <p>Committee reports are posted</p> <p>Reports are current</p>
Legislation	<p>Proposed legislation concerning the administrative court, including its jurisdiction and powers, is posted</p> <p>Testimony on any proposed legislation is posted</p> <p>Proposed changes to administrative</p>

	<p>court's enabling statute are posted</p> <p>Proposed changes to administrative court's procedural rules are posted</p> <p>Postings are current</p>
Court Committees	<p>List of court committees with their functions is posted</p> <p>Membership list and chair of each committee is posted and regularly updated</p> <p>Reports on committee's work are posted annually or other regular intervals</p> <p>Information is current</p>
Budget	<p>Proposed budget</p> <p>Enacted budget</p> <p>Current budget</p> <p>Past three years' budgets</p> <p>Graphs that show budget over time</p>
Management of Public Funds	<p>Expenditure reports</p> <p>Check register</p> <p>Graphs that show spending and revenue over time</p> <p>Information is current</p>
Contracts	<p>Rules governing contracts are posted</p> <p>Access to information on procurement</p> <p>Bidding documents are posted</p> <p>Bids and contracts for purchases over</p>

	<p>\$10,000 are posted</p> <p>Information is current</p>
Website Usability	<p>Consistent use of web domains</p> <p>Website has functional internal search</p> <p>Information can be found in six clicks or less</p> <p>Website written in “plain English”</p> <p>Website easy to use, easy to navigate and information organized</p> <p>Databases are downloadable</p> <p>PDFs and other information are searchable</p>
Agency Information	<p>Hyperlinks to agencies whose cases administrative court hears are available on administrative court’s website</p> <p>Websites of agencies whose cases administrative court hears contain information on appeal rights, including hyperlink to administrative court and any other appellate bodies</p> <p>Procedural and substantive law of agencies whose cases administrative court hears is available through hyperlinks on administrative court’s website</p>
Information for Self-Represented Litigants	<p>Lists of nonprofit legal aid providers are posted</p> <p>Hyperlinks or website addresses for legal information, such as LawHelp.org,</p>

	<p>are posted</p> <p>Information of administrative court's resource center, if any, including address, hours of operation, contact information, and services provided is available online</p> <p>Online resource center, including videos on fair hearing process, is available on administrative court's website</p>
Language Access	<p>Forms are written in plain Spanish or other languages of litigants</p> <p>Language interpreters are available for court information purposes and for hearings</p>
Public Records	<p>Contact information, including e-mail addresses, for court employees and administrators is posted in one central location</p> <p>Daily hearing calendar is available online in advance of hearing date and updated regularly</p> <p>Public is able to access non-confidential case files online</p> <p>Court case files are accessible online or on demand in-person, unless confidential</p>
Court Administrators Ethics	<p>Must have ethics commission and guidelines for ethical behavior of officials</p> <p>Process for reporting ethics violation is posted online</p> <p>Results of ethics investigations are</p>



	<p>posted online</p> <p>Information is current</p>
Court Statistics	<p>Information on number of cases filed, pending and completed over a period of time; duration of cases; number of staff, etc.</p> <p>Information is current</p>
Court Location(s) and Contact Information	<p>Court's mailing and street address are posted online</p> <p>Hearing location's address is posted online, with driving and public transportation directions</p> <p>Hours that court is in operation are posted</p> <p>Contact information, including e-mail addresses, is posted and updated regularly</p> <p>Information is current</p>
Information on Stakeholder Participation	<p>Information on appointment to, participation in, roles, members, and activities of any stakeholder groups, such as advisory councils, is posted and updated periodically</p> <p>Information on stakeholder meetings for agency representatives and other litigants is posted</p> <p>A list of outside groups, including stakeholders, with whom the administrative court has met for input and received suggestions for its transparency initiatives is posted</p>

	Information is current
<b>Judicial</b>	
Information on Appointment and Re-appointment of Administrative Law Judges	<p>Rules on selection, re-appointment and removal mechanisms are posted online</p> <p>Information on vacancies, application process, and applicants is posted online</p> <p>Information on those seeking re-appointment and re-appointment process are posted online</p> <p>Information is current</p>
Information on Administrative Law Judges	<p>Listing of administrative law judges with their appointment dates is posted online</p> <p>Biographies of judges are posted online</p> <p>Jurisdiction(s) or case assignment(s) of judges are posted online</p> <p>Committee assignments of judges are posted online</p> <p>Judges' orders, interim and final, are posted online</p> <p>Information is current</p>
Information on Court Committee Assignment(s)	<p>Committee assignments of judges are posted online</p> <p>Information is current</p>
Financial Disclosure Information	<p>Financial disclosure statements are posted</p> <p>Completed financial disclosure statements are filed and posted annually or on other regular basis</p>
Ethics	Must have ethics commission and

	<p>guidelines for ethical behavior of judges and officials</p> <p>Process for reporting ethics violation is posted online</p> <p>Complaint forms are posted</p> <p>Results of ethics investigations and any resulting orders are posted online</p> <p>Information is current</p>
Statistical Information	Case assignment, case resolution, and backlog data are posted online in regular intervals
Hearings	<p>Daily hearing calendar listing names of assigned judges is available online in advance of hearing date and updated regularly</p> <p>Audio recordings of hearings are available the same day hearings occur</p>
Decisions	<p>Deadlines, if any, for decisions and any extensions allowed for decisions, together with authority, are posted</p> <p>Orders, including interim and final, are posted online</p> <p>Appellate decisions of administrative law judges' orders are posted online<sup>307</sup></p> <p>Information is current</p>

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<sup>307</sup> The author acknowledges that many administrative courts lack search engines for tracking appeals and disclosing subsequent history of their decisions for the public.

Courts will likely develop a checklist that phases in checklist items over a period of years. For example, 2015 checklist items for “Information on Administrative Law Judges” might include only the first two tools, “Listing of administrative law judges with their appointment dates is posted online” and “Biographies of judges are posted online.” Then, 2016 checklist items for “Information on Administrative Law Judges” might add the next two tools, “Jurisdiction(s) or case assignment(s) of judges are posted online” and “Committee assignments of judges are posted online.” Finally, 2017 or beyond checklist items for “Information on Administrative Law Judges” might add the next, and much more ambitious, tool, “Judges’ orders, interim and final, are posted online.” The specific information for each checklist item may change from year to year. Additionally, on some checklist items, the bar can be raised over time to include additional items, based on technology improvements, court operations, and stakeholder input.

#### X. POLICY AND OTHER CONSIDERATIONS BEFORE LAUNCHING TRANSPARENCY INITIATIVES

##### A. *Consider When Transparency is Necessary*

Online transparency policies should target accountability-related information rather than offering information in the name of transparency for its own sake. These policies work only if they give users the information they need, when they need it, and in the form they need it for making an effective decision.<sup>308</sup>

Four principles can serve as a guide to administrative courts when determining checkpoint list items, developing tools to implement checklist items, and devising strategies to marshal resources, fiscal, human and technological, to phase-in those checklist items that require consideration and sustained resources: (1) what information is available, can be made available, and needs to be made available to the public; (2) what information and what level of information enables citizens to protect their interests; (3) whether the information be made easily accessible and understood; and (4) what structures or

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<sup>308</sup> Shkabatur, *supra* note 26, at 81.

procedures the court has in place for action based on that information.<sup>309</sup>

*B. Prioritize Information to Be Posted*

Courts will want to discern what information and records they are required to post and then prioritize posting that which they are required to post before posting that which is within their discretion. Information that courts decide should be published to allow for optimal transparency may or may not be required to be posted. Mandatory transparency information disclosure is required in many jurisdictions by open government laws, Administrative Procedure Acts and other laws. Other information that courts decide should be published for transparency purposes is discretionary on the court's part. Whether disclosure of information is mandatory or discretionary, the court will be well served to apply the four principles discussed immediately above to ensure that information disclosure allows for optimal transparency.

*C. Determine Technological Capabilities*

Courts seem more guarded than other institutions in adopting technological innovations, "and for good reason, considering some of the concerns that the judiciary must consider in deploying new technologies."<sup>310</sup> Courts must build electronic systems that are accessible to the entire population, not just for those more technically capable or better equipped.<sup>311</sup>

Among administrative law judicial systems, there is tremendous divergence in electronic case management systems. Some administrative courts have no electronic case management, others have archaic systems, and yet others have underutilized systems.<sup>312</sup> A number of significant transparency tools, among them access to

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<sup>309</sup> Fung, *supra* note 31, at 208.

<sup>310</sup> 2014 Year-End Report on the Federal Judiciary, *supra* note 235, at 8.

<sup>311</sup> *Id.* at 9.

<sup>312</sup> Based on my discussions over the past several years with presiding administrative law judges at administrative courts throughout the United States, electronic case management systems in administrative courts range from non-existent to highly utilized and state of the art. My search for articles on this subject yielded no articles specific to administrative courts.

court records, decisions, and statistics, are predicated upon use of comprehensive electronic platforms that involve the entire case flow system, from front-end to back-end and, consequently, allow the public to view open court records easier and faster.<sup>313</sup>

As the New Jersey court system prudently did, administrative courts must inventory the judicial business, technology and finance requirements of a comprehensive electronic platform for e-filing, case management, records management, and public access to court records before launching transparency initiatives.<sup>314</sup> The system should be comprehensive at the onset; it should not be implemented with only the front-end complete.

#### *D. Analyze Costs*

Initial costs of a comprehensive electronic system will include implementation costs, including the purchase or lease of new software and equipment, servers, labor costs, training costs, and costs to advertise the system. Additionally, ongoing costs for maintaining the system must be considered. Because courts are subject to government appropriation and procurement processes, lead time to review electronic systems, to seek funding through the budget process, and to complete the competitive bidding process will need to be built into checkpoint plans and projected dates for rolling-out certain checklist items.<sup>315</sup>

#### *E. Address Privacy and Security Concerns*

Before deploying new technologies, confidentiality and security issues must be addressed to protect the integrity of the adjudicatory process.<sup>316</sup> Administrative courts must maintain the security of documents and data when appropriate and limit access consistent with statutes, court rules, and policies of the court. The system must be able to impound confidential documents and redact confidential data elements.<sup>317</sup>

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<sup>313</sup> N.J. COURTS, *supra* note 283, at 4, 14.

<sup>314</sup> *Id.*

<sup>315</sup> 2014 Year-End Report on the Federal Judiciary, *supra* note 235, at 8; N.J. COURTS, *supra* note 313, at 32–36.

<sup>316</sup> *Id.* at 9–10.

<sup>317</sup> *Id.* at 14.

### *F. Develop Evaluation Tools*

In the planning phase of this article, I envisioned a scorecard for administrative courts to grade their transparency, based on an A through F scale, similar to that used by the Sunshine Review. As this article has developed, so too has my thought on a scorecard. The judgmental scorecards are strict, yet serve the decided purpose of rating performance as excellent, good, average, passing, or failing. They may not, however, lend themselves to a transcendent tool and invite discussion on further development that might better serve courts as they move toward greater and better transparency.

Endeavors at transparency may be challenging for administrative courts, as they face budget realities, technological challenges, and security and privacy issues. Additionally, transparency checklist points and corresponding information requirements will likely require modification, perhaps rapidly, for technological and public expectation reasons.

For these reasons, my recommendation is for bifurcated assessments, a judgmental score card for checkpoint and information items on the transparency checklist that are mandatory, and a developmental assessment—like that used by federal government agencies—for those items that are not mandated for disclosure, but are discretionary. This recommendation is in keeping with advice to prioritize mandatory transparency items in rolling-out and maintaining checkpoint items.

### *G. Checklist Points and Tools Will Evolve*

The questions raised, both conceptual and practical, concerning transparency in courts are numerous, among them the following: Where do courts draw the line? Where is disclosure ethically inappropriate? How would your administrative court rate currently if graded on these checklist points and information requirements? Which suggested checklist items should be omitted? Which other transparency checklist items should be considered? What impact does transparency and updating transparency measures have on current and future budgets? What positive impacts might result from implementation of checklist items and how might they be measured? What problems might your administrative court face as a result of unmet transparency measures? What problems might your

administrative court face as a result of its disclosure of information identified on the checklist? As courts consider both costs and benefits to increased transparency, these and other difficult questions will confront us.

## XI. CONCLUSION

The concept of court transparency has been a bedrock in United States' courts since their inception in the 1600s.<sup>318</sup> But the meaning of transparency in the courts has changed dramatically over the years. Today, the public's expectation of court system transparency is fueled by all that is made available in rapid time by technology. Transparency checklist items suggested by this article fall into two broad categories: information on court operations and access to case records and proceedings. Information on court structure, operations, process, and personnel is straightforward and can be posted with relatively insignificant cost or concern for security and privacy. But before opening court records to public view online, administrative courts first must evaluate comprehensively their electronic platform capabilities with respect to case flow; weigh costs and benefits; and develop policies and systems for security of documents and data. Experiences, rules, and policies of courts, particularly state trial courts, as well as guidance provided them by NCSC and COSCA, can serve as a starting point for administrative courts as they transition to electronic systems, open access to electronic records, and thereby, ultimately become more transparent.

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<sup>318</sup> Jones, *supra* note 170, at 379–381.